IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.41 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

NARESH TEXTILES

Appearance:

MR MANISH R BHATT for Petitioner No. 1

SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 23/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The following question of law has been referred by the Income Tax Appellate Tribunal Ahmedabad Bench "B" under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax Gujarat-II, Ahmedabad.

"Whether, the Appellate Tribunal is right in law and on facts in cancelling the penalties imposed on the assessee u/s. 271(1)(a) on the ground that the advance tax paid was more than the tax determined on assessments ?"

2. The Assessment Years are 1978-79 and 1979-80. For Assessment Year 1978-79 the return of income which was due on 31-07-1978 was filed on 27-05-1981. Therefore, penalty of Rs.7,750/- came to be levied under Section 271(1)(a) of the Act. Similarly, for Assessment Year 1979-80 the return of income which was due on 31-07-1979 was filed on 16-07-1981. Therefore, penalty of Rs.5040/- under Section 271(1)(a) of the Act came to be levied.

3. The assessee succeeded in appeals before the Appellate Assistant Commissioner. The Revenue carried the matter in appeal before the Tribunal. The Tribunal, vide its order dated 31-05-1990, held that where the advance tax paid by a registered firm was in excess of the assessed tax, the conduct of the assessee firm cannot be said to be contumacious and no penalty can be levied. This finding was based on the reasons given by the Tribunal in its own order in case of M/s.Dhirajlal and Brothers in I.T.A. No.647/Ahd/87 dated 21-05-1990.

4. On behalf of the applicant - Revenue Mrs.M.M. Bhatt, learned Standing Counsel, submitted that the aforesaid view of the Tribunal is erroneous in light of decisions of this Court rendered in following judgments.

(i) Unreported decision in case of Commissioner of Income Tax Vs. Textile & General Engineer Co., I.T.R. No.34 of 1986, decided on 18-09-2001;

(ii) Unreported decision in case of Commissioner of Income Tax Vs. Natverlal Jivanlal, I.T.R. No.6 of 1993, decided on 17-07-2002; AND

(iii) Commissioner of Income Tax Vs. Dipak Construction Co., I.T.R. No.249 of 1993, decided on 18-07-2002.

Though served, there is no appearance on behalf of the respondent - assessee.

5. Having gone through the aforesaid decisions of this Court it is apparent that merely because advance tax was paid in excess of the assessed tax and a refund was due to the assessee in the status of registered firm, the Tribunal was not justified in holding that no penalty was leviable. However, the Tribunal has not considered whether the assessee was prevented by a reasonable cause from filing a return of income in time. In the circumstances, the question referred is answered in favour of the Revenue and against the assessee. The Tribunal shall decide the issue as to whether the assessee was prevented by a reasonable cause from filing the return of income within the prescribed time while passing order under Section 260(1) of the Act after giving necessary opportunity to both the sides.

6. The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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'Bhavesh'